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IN THE

Supreme Court of the United States

No. 363 8

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

ALFRED KLESNER, doing business under the name "Shade Shop," Hooper & Klesner,

Respondent.

BRIEF FOR RESPONDENT

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Attorney for Respondent.

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BRIEF FOR RESPONDENT

Statement of Facts

The principal complaint made against respondent is that he has used the words SHADE SHOP on a show window on a place of business, and an automobile truck owned and operated by him, and in the Telephone Directory for the City of Washington, in conjunction with his trade name, Hooper & Klesner, in such manner as to confuse, mislead and deceive the general public into the erroneous belief that respondent's place of business was that of one conducted by W. Stokes Sammons, who conducts a similar business under the name of "The Shade Shop."

The testimony shows (pp. 252, 253, 285, 286) that one H. S. Hooper since the year 1904 was engaged in the sale and hanging of wallpapers, decorating, painting and the window shade business, and that during 1909 the firm of Hooper & Klesner was formed by the aforesaid H. S. Hooper and respondent, which succeeded the business theretofore conducted by the said H. S. Hooper (pp. 231, 252, 253, 285, 286 and 304), that during 1919 respondent purchased Hooper's interest in said business and has continued under the name of Hooper & Klesner; that the respondent has at all times traded under the firm name and style of Hooper & Klesner; has never traded with any firm, person or corporation, under any other name; has never stamped his shade goods with the name "The Shade Shop," or "Shade Shop"; that he has never carried the name or words "Shade Shop" on any of his stationery (pp. 293 and 314) by way of advertisement in newspapers or other publications, or signs or otherwise, except in conjunction with or accompanied by the firm name of Hooper & Klesner, which firm name has always been given as great or greater prominence than the words "Shade Shop" (pp. 253, 259, 274, 277, 262, 305, and Respondent's Exhibits 10 and 11).

Some time prior to 1912 the said W. Stokes Sammons began a window shade business in the City of Washington and placed on his stationery and by way of signs on his building, the words "The Shade Shop." During the year 1911 Sammons appealed to one Luther L. Derrick, who was engaged in the paperhanging, painting and decorating business and the sale of window shades, for financial help, and an agreement was reached between Derrick and Sammons whereby Der-

rick purchased and paid for all materials to be used in the business of "The Shade Shop," collected all bills (pp. 225, 226, 236), and whereby said Sammons was to perform the manual labor, make weekly reports to Derrick for work done and collections made in consideration of which the said Sammons was to receive a weekly salary of $20.00, and 10% of the net proceeds derived from said business (pp 174, 224) and Respondent's Exhibits 3, 4, 5 and 7); that the latter part of 1912 Derrick leased a building at 819 15th Street, Northwest, and housed his paperhanging, painting and decorating business on the first floor and assigned to "The Shade Shop" the second floor (pp. 225, 226), and "The Shade Shop" was moved to 819 15th Street, Northwest, and remained there until May, 1914.

While "The Shade Shop" business was at 819 15th Street, N. W., the business was advertised with a big sign across the front of the building (p. 227) "The Shade Shop" and there was no mention of Sammons' name by way of signs on the building, and the only instance in which his name appeared was on stationery where it appeared in the capacity of Manager (Commission's Exhibit 57) and during all this time Derrick's bookkeeper kept all the accounts, attended to correspondence, banked in Luther L. Derrick's name all the receipts from the business and Luther L. Derrick paid all bills incurred in the business and used his credit (p. 226; Sammons 122, 179).

In May, 1914, Sammons and Derrick dissolved the aforesaid agreement and Sammons entered into a lease with the firm of Hooper & Klesner, respondent, for a part of the storeroom situated at the corner of 12th and H Streets, N. W., and until November, 1915, conducted therein a window shade business under the

name of "The Shade Shop," W. Stokes Sammons, 'roprietor, at which latter time he breached his lease with respondent and moved his business to a storeroom located two doors south of H Street on Twelfth Street (No. 733) and where simultaneously there was opened "The Decorative Shop, " a wall paper and decorating business in competition with respondent (p. 308).

Neither respondent nor his employes have ever done anything intentionally or otherwise to deceive the public into the belief that respondent's place of business was that of W. Stokes Sammons, but on the contrary he gave specific instructions to his employes to inform all persons inquiring for said Sammons that his was not Sammons' place of business (Blundon 262, 263, 267, 270; Williamson 275; Marceron 287, 297; Klesner 316). It also appears that said instructions were strictly followed and that numerous persons who inquired for Sammons were directed to his place of business (Blundon 261, 262, 268, 269; Marceron 293).

That within a few days after Sammons moved to 733 12th Street, N. W., he instituted, without prior complaint or notice to respondent, a suit in the Supreme Court of the District of Columbia, seeking to enjoin respondent from using the words Shade Shop on his windows and claimed exclusive use of said words as his trade name, which suit, after hearing and argument on bill, rule to show cause and answer, the rule to show cause was discharged (Respondent's Exhibit 7) which suit remained dormant on the docket until May 24, 1920, when it was dismissed and December 18th, 1920, this proceeding was commenced by the Federal Trade Commission.

Respondent moved from 12th and H Streets a few

months after this proceeding was instituted, to 929 H Street, Northwest. Respondent's Exhibit 8 shows the character of signs on this location and nowhere do the words "Shade Shop" appear at that place of business (p. 327), except the words "Shade Shop" appear on the curtain of an awning (see photo p. 426 filed with the petition to this Court for the enforcement of the Federal Trade Commission's Order). The advertisement running in the classified department of the Telephone Directory (p. 428) carries very plainly the name of Hooper & Klesner, and could not be confused. The Telephone Company's representative (Hunt pp. 55, 56) testified that the listing of the words "Shade Shop" alone in the main body of the Telephone Directory was the result of the Telephone Company's recasting of its Directory and was without the request, knowledge or consent of respondent.

When Sammons moved to 733 12th Street, Northwest, he financed the Decorative Shop, which was opened in the same building with his Shade Business (two doors below respondent's then place of business) (pp. 205, 206, 207) and he had an interest in the profits, waited on the trade, took orders for paperhanging, painting and decorating and there was nothing on the building or place of business to indicate to the public that the Shade Shop and the Decorative Shop were under different ownerships and managements, and after some twelve months or thereabouts Sammons sold the business of the Decorative Shop (p. 207).

Ninety per cent of the supposed confusion testified to by Sammons while at 733 12th Street, N. W., was to a "considerable extent" due to the fact that his (The Shade Shop) business was so closely located to that of respondent's (Sammons p. 205).

Witnesses produced by respondent, among whom were Charles A. Appleby and Russell B. King, persons engaged in the real estate business, in this city, and having occasions to purchase shades, describe the character of signs on the building, and were not confused or deceived (pp. 252, 258). King testified (p. 259) that he often had occasion to call by telephone both the place of Sammons and Hooper & Klesner concerning shades and was asked, "Did you have any difficulty in finding their (The Shade Shop) name in the Telephone Directory?" Answer, "No." Appleby said (p. 258) he did not consider the signs on respondent's place confusing or similar. Blundon testified (p. 262) that there has been no confusion since respondent and Sammons were on 12th Street and he only recalls two persons who made inquiry for Sammons at the 12th Street address and they were directed to Sammons' place; Klesner (p. 315) heard no complaints of confusion.

ARGUMENT

Exceptions to the Commission's Findings of Fact, Which Are Not, As Disclosed by the Record, Supported by a Fair Preponderance of the Evidence

It is contended that a *fair, unbiased consideration* of the evidence as disclosed by the record will not justify the findings as to the facts as made by the Commission, to which exception was taken.

Commission's Findings Analyzed

Paragraph 1 *finds* that the respondent is "Doing business under the trade name and style of 'Shade

Shop—Hooper & Klesner','' when in fact nowhere in the record is there one scintilla of evidence that such is the case, but on the contrary the undisputed testimony is that he trades and does business under the firm name of HOOPER & KLESNER (Sammons p. 203; Derrick 231; Appleby 253; King 258; Blundon 262; Williamson 273, 274, 277; Marcevon 286, 293; Klesner 303.)

Paragraph 2 finds that Sammons adopted the name The Shade Shop in the year 1901 and has continuously up to the present used such as a trade name. (The complaint filed only claims from 1907.) This finding is based entirely upon the testimony of Sammons, and a perusal of his testimony, at most any part under cross-examination will disclose that he contradicts himself consistently and is most evasive of pertinent questions and would have us believe that he is unable to understand questions propounded to him (pp. 161 to 223 and 243 to 251). Yet Sammons testified (pp. 243 and 244) concerning the use of the words ''Proprietor'' and ''Manager'' following or in conjunction with ''The Shade Shop,'' and that he ''Did not know who the 'Shade Shop' rating belonged to in the credit rating * * *'' and that it was on the suggestion of his banker when he went into business at 12th and H Streets in 1914, ''* * * that I should style my business as 'The Shade Shop'.'' Derrick testified (pp. 237) ''he (Sammons) used his own name'' for probably a year or two before he and Sammons made agreement in 1912. Then Derrick testified that while at 724 11th Street, N. W., and 819 15th Street, N. W., he financed the business and took 90% of the profits (pp. 224, 237, 238) (Respondents Exhibit 3-5, pp. 389-390); paid all bills payable and collected all bills re-

ceivable, and paid Sammons a weekly salarly of $20.00, and 10% of the net profits, and Derrick assigned the second floor to The Shade Shop at 819 15th Street, a building he had leased, so as to have the business under the same roof with his paperhanging and decorating business and maintained on said building a sign "The Shade Shop" (p. 227). Derrick only knew Sammons to be trading under such a name for a couple years prior to his taking over the business at 724 11th Street in 1911 (p. 237).

Paragraph 3. The *finding* that Sammons had traded as "The Shade Shop" for the number of years and at the places mentioned, is predicated entirely upon Sammons' statement; the Commission's complaint filed claimed and charged that Sammons only used this name since 1907; Derrick did not know that he was (p. 237) so trading all these years, and no one else was produced. It is submitted further that the arrangement and contract with Derrick in effect at 724 11th Street and 819 15th Street, caused a hiatus in any term during which Sammons claims he so traded.

Paragraph 4. Exception is taken to the finding that all during the time alleged Sammons traded under the name The Shade Shop, for reasons previously assigned, under paragraph 3 hereof, and it is submitted that the *finding* that The Shade Shop, to the public has come to and does mean the place of W. Stokes Sammons, is a conclusion and is not supported by evidence.

Paragraph 5. The *finding that* "Respondent, Alfred Klesner, was not and never had been engaged in the business of manufacturing or dealing in window shades, other than receiving occasional orders given his employes, etc.," is not even a *fair* statement of the facts. Again this finding is based upon Sammons' un-

supported statement, and of course he would be expected to so minimize respondent's business in shades. Appleby, connected with a large real estate firm, testified (p. 253), "We have been doing business with Hooper & Klesner * * * from about August, *1904*, we gave Hooper & Klesner, Harry S. Hooper, the first shade order. That is the first shade order I had with Hooper, and right along after that more and more until eventually Hooper & Klesner came to get all our work in shades." And further this witness testified (p. 256) that Hooper & Klesner had done the shade work for his firm, representing and handling apartment houses and other properties, for all his clients. Marceron (p. 286) testified that he had known Hooper when he was in business for himself (prior to 1909) and that Hooper was then selling window shades. Williamson testified (p. 273) that she was with Hooper & Klesner since they were on 11th Street. Derrick testified (p. 230) that he had known Hooper & Klesner since they were on 11th Street and that they were "making shades and painting and hanging paper," and Sammons (p. 130) testified he had "considerable business with Hooper & Klesner during 1910 (when on 11th Street) to 1914, and that "Eighty per cent of wall paper men do shade business" (p. 131), and while on 11th Street respondent gave him orders for making and hanging shades for respondent's customers (p. 186). Klesner testified (pp. 304, 314) that he had been engaged in the window shade business since 1909, and that Hooper, his predecessor, had previously been engaged in the window shade business, and that he had done business with Sammons, dealing in shades while both of them were on 11th Street in the 700 block. Klesner (p. 333) said Sammons hung

shades at one building for him "a hundred times." Notwithstanding all this testimony the Commission FINDS that they had not been engaged in the shade business prior to 1912, except to the extent of an occasional order.

Paragraph 6. The Commission finds that Sammons' business had been built up to a gross annual sum of $60,000.00 at 12th and H Streets, when in fact Sammons himself testified (252), "Q. You are positive that in round figures, it was $30,000 the volume of business the last year that you were at 12th and H Streets? A. Yes, sir. Q. Since that time it has jumped to $60,000, $75,000 or $80,000? A. It has." The further finding as to the episode in the place at 12th and H Streets, one Sunday morning follows almost literally the version of Sammons, and disregards the explanation and version of Klesner. See Klesner's testimony (pp. 310 to 313).

Paragraph 7. The *findings* in this paragraph are plainly favorable to Sammons and unnecessarily inject into the findings and record charges of malice and hatred on the part of Klesner for Sammons; yet the findings totally ignore any reference to the suit with Sammons, only a few days after leaving 12th and H Streets, N. W., instituted in the Supreme Court of the District of Columbia, without prior complaint or notice to respondent, in an attempt to enjoin the use of the words Shade Shop on the windows of the place of business of Klesner, and his manifest attempt to harass, annoy and embarrass Klesner (Respondent's Exhibit 7; Klesner p. 336) and also ignore testimony by Sammons (pp. 205, 206, 207) to the effect that he financed the opening of a "Decorative Shop" in competition with Klesner, doing paperhanging and paint-

ing, at the time he moved to 733 12th Street, N. W., and housed it in the same place, shared in the profits, waited on customers, and finally sold it to another firm. *In finding* that respondent used the words "Shade Shop" on his stationery they take the confused statement of Williamson under cross-examination (p. 281) and ignore her original testimony (p. 277) and ignore Marceron's testimony (p. 293) that no such use was made, and ignore Klesner's testimony (p. 314) denying any such. The *finding* as to the words "Shade Shop, Hooper & Klesner" on respondent's truck is based upon Sammons' testimony, unsupported again, and no mention is made of the testimony even by Sammons that the words "Wall Papers" "Painters" also appeared thereon. The FINDING in this paragraph that persons have been deceived by the use of the words "Shade Shop" on the windows at 12th and H Streets, since Sammons left, does not take into consideration the fact that practically every witness produced by the Commission admitted that they walked into the place, blindly, so to speak, without observing the name of Hooper & Klesner (Bowie p. 17, 18; Goff p. 20; Shelton p. 40; Lines p. 49; Wills pp. 69, 70) in large letters over the door and that the thing mostly in view was that of wallpaper, and made no complaint to Klesner and was satisfied with the transaction; nor does this finding give any credit to the testimony of Marceron, Blundon, Williamson or others, wherein they testified (pp. 262, 263, 270, 274, 293, 316) that they invariably informed persons calling there and inquiring for Sammons, that this was not Sammons' place but was Hooper & Klesner's Shade Shop, pursuant to instructions of Klesner, and had in many instances directed them to Sammons' place.

A careful consideration of the testimony in this case will convince the Court that the FINDING is grossly partial to Sammons, whose testimony it is suggested is of a most unsatisfactory character, highly contradictory (pp. 172 to 223, pp. 243, 252), absolutely biased and prompted, naturally, with interest in the outcome of the case, while there is not a SINGLE reference made to any evidence adduced by respondent which would have the slightest tendency to place him in a favorable light for consideration, but on the contrary the finding as a whole would indict him as almost a scoundrel. It is respectfully submitted that the finding is not supported by a fair interpretation of the testimony, is biased, partial, unfair and unjust, and respondent takes exception to such findings as a whole and submits they are not supported by such evidence as is contemplated under the law.

POINT NO. 1

The Words "Shade Shop" Are Not the Subject of Appropriation by One to the Exclusion of Others

The Commission's brief claims that this is a case of unfair competition and that the unfair competition by the respondent Alfred Klesner *consists* of his adoption and continued use thereafter of a trade name, to-wit, SHADE SHOP, almost identical with the trade name, to-wit, "The Shade Shop" previously adopted and used by W. Stokes Sammons, who is the complainant before the Commission. The complaint (pp. 1 and 3) and the order (p. 416) are to the effect that the use of the words Shade Shop by respondent constitutes unfair competition.

Therefore, the principal question involved here is

whether Sammons is entitled to the exclusive appropriation of the words "Shade Shop." It is contended by the respondent that Sammons cannot appropriate these words to the exclusion of all others, and the Commission cannot go beyond the scope of its complaint and order.

It should be borne in mind throughout this case that the Commission does not claim that these words "Shade Shop" are arranged in any particular manner or form any fanciful design. It should also be borne in mind that it does not claim that Sammons stamps his goods with this trade name or that respondent stamps his goods with the words "Shade Shop."

These words are strictly descriptive and therefore cannot be appropriated by one as a trade name to the exclusion of others any more so than the words Umbrella Shop, Book Shop, Violin Shop, Millinery Shop, Print Shop, Candy Shop, etc., etc., which describes the character of business or kind of goods to be had in a place bearing such words.

Sammons' own idea as to the meaning of the words "Shade Shop" and what they convey to the public is that it is a place where shades are manufactured, as distinguished from a place where ready-made shades can be purchased (p. 222) and no other words will convey the same meaning to the public; that he so intended to convey this meaning when he first adopted the name "The Shade Shop" (pp. 162, 163, 164, 168, 169) and that many places of business resort to the names Print Shop, Umbrella Shop, Violin Shop, Candy Shop, Book Shop, Corset Shop, etc (p. 162).

The law dealing with trade names is very well settled and it is needless to say more than that such words as are strictly descriptive cannot be appro-

priated by one as a trade name to the exclusion of others.

Goodyear vs. Goodyear, 128 U. S. 598,
Del. & H. Canal Company vs. Clark, 13 Wallace
Standard Paint Co. vs. Trinidad, 220 U. S. 452,
National Watch Co. vs. Ill. Watch Co., 179 U. S., 664,
Koehler, et al. vs. Sanders, 48 Hun. (N. Y.) 48,
Choynski vs. Cohen, 39 Calif. 501.
Corbin vs. Gould, 133 U. S. 308,
Liggett vs. Finzer, 128 U. S. 182.

The State cases cited by the Commission in support of its contention are cases in which there was a manifest attempt on the part of the defendants to deceive the public and to palm off their goods for those of another and the evidence before the Court was decidedly stronger than that which can be found in the records here.

POINT NO. 2

There Is No Real Confusion or Deception of the Public So Far as the Record Discloses and Such As Has Been Testified to Is Insignificant

A careful analysis of the testimony of the various witnesses produced by the Commission to testify concerning their supposed confusion will disclose (pp. 17, 18, 19, 40, 49, 69) that none of the witnesses used ordinary diligence or intelligence in seeking out Sammons' place or manifested a reasonable degree of intelligence on entering the place for the transaction. All of them testified in substance that they walked into the place of respondent without observing the character of signs displayed on the building, among which

were large signs (Commission's Exhibit, p. 389) of "Hooper & Klesner," "Wallpapers" and "Painters," and within which place of business the principal thing in sight was wallpapers, made known their wants, had them supplied and were satisfied and never thereafter complained to respondent of any confusion.

In the case of *McLean vs. Fleming*, 98 U. S. 245, the Court said:

> "A Court of Equity will not interfere when ordinary attention by the purchaser of any article would enable him at once to distinguish the one from the other,"

and in the case of *Howe Scale Company vs. Wycoff*, 198 U. S. 973, the Court reiterated the doctrine that the Courts would not interfere and enjoin the use of the name similar to that of the complaining party, although great loss might be sustained and notwithstanding that the public might, of *its own oversight or lack of prudent observation*, be occasionally deceived.

Ninety per cent of such confusion as did exist, according to Sammons' own statement was while he was at 733 12th Street (which should be borne in mind is just two doors below that of the place of business of respondent and a location selected by him), and was "to a considerable extent" due to the fact that his and respondent's place of business were so closely located to each other (Sammons p. 205).

The record does not disclose any confusion between Sammons and respondent's place of business since Sammons left 733 12th Street and respondent moved to 929 H St. N. W.

It is quite evident that the supposed confusion has not injured in any manner Sammons' business. He

claims (p. 252) that his business jumped from $30,000 annually in the last year at 12th and H Streets to $75,000 and $80,000 at present.

During the taking of testimony respondent moved to a building purchased by him at 929 H Street, Northwest, and nowhere on the building appeared the words "Shade Shop" at that time (p. 327, on p. 400 Respondent's Exhibit 8). Since that time the words "Shade Shop" have appeared alone only in the Telephone Directory in the main listing; in the classified section of said Directory juxtaposed with the name of the firm Hooper & Klesner, in bold letters, and on the apron of an awning (used only in the summer season) on the front of the store (see p. 426) where it can hardly be seen. The listing in the main part of the Telephone Directory, it should be borne in mind, wherein the words "Shade Shop" stand alone with the telephone number, came about by reason of the business policy of the Telephone Company, without the request, knowledge or consent of respondent (Hunt pp. 55, 56).

Appleby (pp. 252-258), King (p. 259), Klesner (p. 315) deny any confusion in the name.

POINT NO. 3

He Who Seeks Equitable Relief Must Do So With Clean Hands

In the findings by the Commission there has been injected a charge of malice on the part of respondent toward Sammons. It is evident from the record that considerable ill feeling has existed between Sammons & Klesner, since Sammons breached his lease and left 12th and H Streets, and moved two doors below to 733 12th Street. Klesner's version of the episode of

the Sunday morning following (pp. 310 to 314) and Sammons version of this affair differ materially.

Sammons' manifestation of his intent to harass, annoy, and embarrass Klesner can be found in Respondent's Exhibit 7, and the fact that almost immediately upon leaving 12th and H Streets, Sammons instituted, without any notice to Klesner (p. 336), a suit in the Supreme Court of the District of Columbia to enjoin respondent from the use of the words "Shade Shop," and charged that he had suffered great loss and irreparable damage because of respondent's use of such words, when as a matter of fact only a few days had elapsed between his leaving and the date of the suit. The rule to show cause laid upon respondent was discharged on bill, return, answer and argument of counsel. It is strange, to put it mildly, that the bill of complaint was removed from the files between the date of respondent's answer to the Commission's complaint and the hearing (p. 300). This case remained on the docket for about five years and was dismissed May 24, 1920, only a short time before Sammons resorted to the Federal Trade Commission and had a complaint issued in an endeavor to accomplish that which he was denied in the courts. The record discloses Sammons' vindictive and malicious spirit and a careful scrutiny of his testimony (pp. 205, 206 and 207) will evince the court that in truth and fact he was the real owner, instigator and proprietor of the Decorative Shop and will force a conclusion of a deliberate attempt on his part to harass, annoy and oppress respondent and injure him in his business by opening a business in competition with respondent a few doors below, and put him to great expense. It is respectfully submitted that in this proceeding, Sam-

mons is but furthering that intent at the expense of the United States Government and without cost to him. It should be borne in mind that Sammons made no complaint of the use of the words "Shade Shop" by Luther L. Derrick when he used the term or words Derrick's Shade Shop (p. Derrick 230 and 231; Sammons 161, 185), or others who were and still are using the words Shade Shop with their names, in Washington, D. C., of which facts the Court will take judicial notice.

POINT NO. 4

This Is a Controversy Arising Between Two Individuals, Competing In Trade, and Does Not Affect the Public Interest, As Contemplated by the Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act provides—

> "That unfair methods of competition in commerce are hereby declared unlawful," and
> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce."
>
> "It is further provided that—
> "Whenever the Commission *shall* have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, AND if it shall appear to the Commission that a proceeding by it in respect therof *would be to the interest of the public*" * * *

the Commission shall institute a proceeding in the manner prescribed. It is then further provided that, if the person, partnership, or corporation proceeded against fails or neglects to obey the Commission's order made after such proceeding, the entire case may be removed from the Commission's jurisdiction to the Circuit Court of Appeals; and the court is, in the plainest of terms, clothed with

> "* * * jurisdiction of the proceeding *and of the question determined therein,* and shall have power to make and enter *upon the pleadings, testimony, and proceedings* set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. *The findings of the Commission as to the FACTS, if supported by the testimony, shall be conclusive.*"

The language of the Act, we respectfully submit, is perfectly plain and unambiguous; and its meaning is: (1) that the Commission *must* have reason to believe that a person, partnership, or corporation has been or is using unfair methods of competition in commerce; *and* (2) that it *must* further appear to the Commission that a proceeding by it "would be to the interest of the public." If those two things do not concur in the minds of the Commission before the proceedings, or are not proved by the testimony taken therein, then any action the Commission may take is clearly beyond its jurisdiction. We feel that the true and correct construction, and the thing meant by Congress in the enactment of the Federal Trade Commission Act is: That the Commission should use its offices to prevent unfair methods of competition in cases affecting the public interest only; and should not attempt to control the conduct of

individual business men not affecting the public. Such individuals are plainly left to their remedies in the courts. Federal Trade Commission Act was meant to supplement the earlier legislation governing unlawful combinations, the regulation of commerce, trusts and monopolies; and the Commission was never meant to have, and has not been given, jurisdiction except in cases where the public interest is affected by actions and conduct not specifically covered and denounced by the former acts. One searches in vain for anything in the Federal Trade Commission Act which expressly, or by necessary implication, deprives the appropriate courts of jurisdiction over two tradesmen in respect of the conduct of their business, where the interests of the public are not injuriously affected.

The foregoing contentions are supported by numerous authorities, among which are the following:

The leading case of *Federal Trade Commission v. Gratz*, 253 U. S., 421, 64 L. Ed. 993, is authority for the proposition that, under the Act, the courts must look to the preliminary action of the Commission, to its complaint against an alleged violator of the law, as well as to the evidence; and, if it be found from the complaint that no action is warranted, or from the evidence that the Commission acted without jurisdiction, then its findings and order are to be reversed. The court said, in part:

> "The words, 'unfair methods of competition' are not defined by the statute, and their exact meaning is in dispute. *It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include.* They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by

deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

This court may, therefore, consider the entire record certified to it and say whether the Commission acted with or without jurisdiction. It is just as much a question of jurisdiction whether it be noticed in the "pleadings" (complaint) or in the testimony; and if jurisdiction is wanting, it is the court's duty to notice and act upon it at any stage of the proceeding. If, as we contend, this is purely a dispute between Hooper & Klessner on the one hand and Sammons on the other as to the right to use the name "Shade Shop," or "The Shade Shop," one to the exclusion of the other, and the interests of the public are not injuriously affected, then it is for the court to say whether the action of the Commission in passing the order here in question was within its jurisdiction. We say the testimony shows no injury to the public, and that the parties should be left to the courts, where Sammons originally asserted his complaint against Klessner, and later abandoned that procedure for the easier and, perchance, the less costly one, to him, before the Commission.

In the case of *Federal Trade Commission v. Raymond Bros. Clark Co.*, 263 U. S. 565, 68 L. Ed. 448, this court, through Mr. Justice Sanford, said in part:

"We pass, without determination, the preliminary contentions of The Raymond Company that

the findings of the Commission are not supported by the testimony in many respects, and that, as both the complaint and the findings of facts relate merely to a controversy between it and a single manufacturer, over a single shipment of merchandise, the broad order of the Commission ordering it to cease and desist from all acts of like character with the 'entire commercial world' is improvident and cannot be sustained.

"The gravamen of the contention in behalf of the Commission is that the conduct of the Raymond Company, acting alone and not in combination with others, in threatening the withdrawal of patronage from the Snider Company if it continued to sell goods to the Stores Company, constituted an unfair method of competition, oppressive in its character, unlawful when tested by common-law criteria, and having a dangerous tendency unduly to hinder competition."

In this connection it is to be noted that this respondent is attempted to be prevented from using the name "Shade Shop," standing alone or in conjunction with any other words; and this notwithstanding the record is clear that the trade name "Hooper & Klessner" is always given greater prominence than the former. (See cease and desist order and exhibits.)

In the case at bar there is no element whatever of a monopoly or of an attempt to acquire one. In short, as appears from every part of this record, the whole controversy had its very inception and being in the personal grievances and antagonism of W. Stokes Sammons, the respondent's business rival, whose battle the Commission has so generously sought to fight at the expense of the Government; and it is equally clear that the public is not injuriously affected by the respondent's conduct.

In the case at bar, we submit the Commission has shown no right to determine, much less to interfere with, the right to the use of the name "Shade Shop," or "The Shade Shop," as between Sammons and Klesner; and, its attempt to do so is beyond its jurisdiction.

The case of *Royal Baking Powder Co. v. Federal Trade Commission*, 281 Fed. 744, holds that the intent of the Federal Trade Commission Act is the *prevention of injury to the general public.*

Is not the Federal Trade Commission in this case simply attempting to inject itself into the affairs of two rival commercial concerns in respect of a course of conduct which, at the common law, was not recognized as improper? Of course, if there were evidence in this case that respondent was "palming off" his goods as those of his competitor, or false and improper labeling, or that he is conducting his business in such manner as to mislead the purchasing public, despite the exercise by it of reasonable powers of observation, a different situation might exist; but here there is no proof whatsoever that any such practices exist or that there is any excuse for the public to be mislead or deceived, the argument of the Commission and its authorities dealing with "palming off" to the contrary notwithstanding.

It is thus clearly demonstrated that the Commission has a very limited authority, and that its every action is subject to the review, correction, and control of the court. It may not act as a court of equity in respect of matters or disputes between two individuals, as it here seeks to do. Were it otherwise, the Commission would successfully do what it has always tried to do, enlarge and broaden its powers, by interpretation, until it

would oust the courts of their jurisdiction in practically all matters involving commercial conduct and pursuits. The Commission had no jurisdiction, under the law, and it is this court's duty to say as much. If we correctly read and understand the Commission's brief, it is contended that the determination of the question of jurisdiction, both primarily and finally, is merely an administrative matter over which this court has no control; and that such determination by the Commission must stand, although the action of the Commission be to ursurp the powers and functions of a court of equity. In the Federal Trade Commission Act Congress has plainly declared, and the courts have as plainly construed, the Commission's power to be administrative merely; and that its every action may be reviewed by the court. Of course such review is provided for the plain purpose of preventing abuses and usurpation of power.

In the case of *Pacific States Paper Trade Association v. Federal Trade Commission*, 4 Fed. 2d. 457, the Commission passed an order which, among other things, attempted to prevent the trade association from "discussing uniform terms, discounts, and prices, or employing any similar device tending to affect prices." The court held that, while the making of agreements between dealers for the fixing of prices might be prohibited, the order of the Commission attempting to prohibit *discussing* such matters was beyond the power of the Commission. The court adverted to, and followed, the case of *Federal Trade Commission v. Sinclair Oil Co.*, 261 U. S. 463, and said: "In this respect we think the order goes too far," and added * * * "nor was it the purpose of the statute to reduce trade organizations to the

status of mere social clubs, or to restrict the conversation of members to mere idle gossip." This case is but illustrative of the numerous matters of commercial business into which the Commission has obtruded itself in quest of things over which to assume jurisdiction, and to usurp the powers and functions of the courts.

THE LAW AS APPLIED TO THE FACTS

The act does not enlarge or change the definition of unfair methods of competition as laid down by the Courts prior to its enactment.

In *Federal Trade Commission vs. Gratz*, 253 U. S. 421, on this point Mr. Justice McReynolds said:

> "It is for the Courts, not the Commission, ultimately to determine as a matter of law what they include."

> "The act certainly was never intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade, * * *. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. *U. S. vs. Colgate*, 250 U. S. 300; *U. S. vs. Schraders Sons, Inc.*, 252 U. S. 85."

A generic name, or a name merely descriptive of an article of trade, of its qualities or ingredients or characteristics cannot be employed as a trade mark or trade name and the exclusive use of it be entitled to legal protection.

In *Delaware & H. Canal Co. vs. Clark*, 13 Wallace, 311, the plaintiff adopted the name Lackawanna Coal as a name for its product and had used this name for

a long time, and it was charged that the defendant had invaded its rights when the defendant too used this name for his coal. Mr. Justice Strong in an able opinion said:

> "There are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could the public would be injured rather than be protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities or ingredients or characteristics be employed as a trade mark and the exclusive use of it be entitled to legal protection." * * * If the plaintiff's sales are diminished it is because they are not the only producers of Lackawanna Coal, and not because of any fraud of defendant."

This principle is reiterated in the *Goodyear case,* 128 U. S. 598—involving the use of the name Goodyear Rubber; the Court said:

> "Names which are descriptive of a class of *goods* cannot be exclusively appropriated by anyone." (Italics ours.).
>
> "* * * Parties united to produce and sell wine, or to raise cotton or grain, might well style themselves as *Wine Company, Cotton Company,* or *Grain Company;* they would *in no respect impair the equal rights of others engaged in similar business to use similar designations* for the obvious reason that all persons have a right to deal in such articles and to publish the fact to the world." (Italics ours.)

In *Brown Chemical Co. vs. Myer,* 139 U. S. 54, 35 Law. Ed. 247, a case involving the use of descriptive

words as a trade mark, the Court among other things said:

> "The general proposition is well established that words which are merely descriptive of the character, qualities or composition of an article, *or of the place where it is manufactured or produced* cannot be monopolized as a trade mark." (Italics ours.)

In *Howe Scale Co. vs. Wycoff et al.*, 198 U. S. 120, a suit to enjoin, on the grounds of unfair competition, the use of the name Remington-Sholes Company and the designation, in selling typewriting machines, of "Rem-Sho" and "Remington Sholes Company," and a name of which Remington was a part, and where it appeared that defendant took steps by advertisements and instructions to agents to distinguish their product, as in the case at bar, the Court, among other things said:

> "They did not choose the complainant's name literally, or so closely that those using ordinary discrimination would confuse the identity of the two names * * *. The name 'Remington-Sholes Company' is not identical with or in imitation of 'Remington Standard Typewriter Company' or 'E. Remington & Sons' * * *."
>
> "The use of two distinct surnames clearly differentiated the machine of the defendant from those of complainant, and when defendant's cards, signs, catalogues, instructions to agents, etc., are considered, it seems to us that the record discloses, to use the language of Mr. Justice Fields in the *Goodyear case*, a persistent effort on defendant's part to call the attention of the public to its own manufactured goods and the places where they are to be had, and that it has no connection with the plaintiff:

"Having the right to that use, Courts will not interfere where the only confusion, if any, results from a similarity of names and not from the manner of use. The *essence of the wrong in unfair competition consists of the sale of goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods for those of another, the action fails.*" (Italics ours.)

In the case here the words "Shade Shop" are used, by respondent, in such manner, we submit, that there is no room or excuse for confusion on the part of the public. In the case here, as in the case cited, instructions have been given to the agents and employees of respondent and the evidence is that the instructions have been carried out to the letter.

Standard Paint Co. vs. Trinidad Asphalt Manufacturing Co., 220 U. S. 452, a suit seeking to enjoin the use of the name Rubbero by the manufacturer of a product known as Rubberoid, the Court, after pointing out that both of these words were descriptive and therefore not susceptible of adoption as a valid trade mark, and although put up in rolls of a similar size and stamped with similar labels, said:

"To preclude its use because of such resemblance would be to give the word 'Rubberoid' the full effect of a trade mark while denying its validity as such."

Other cases on the points involved here are:

Waterman vs. Waterman, 235 U. S. 88,
Elgin Watch Co. vs. Illinois Watch Co., 179 U. S. 664,
Bender vs. Enterprize Mfg. Co., 176 Fed. 641,

Deering Harvester Case, 91 Fed. 376,
Ball vs. Seigel, 116 Illinois 137,
Eggers vs. Hink, 63 California 445,
Popham vs. Cole, 66 N. Y. 669.

The modern authorities have never attempted to do more than to require the defendant to distinguish his place where possible confusion or real confusion exists.

POINT NO. 6

Commission's Authorities Analized and Discussed

An examination of the cases cited by the Commission in support of its contentions will disclose that nearly all of them are *trade mark* or *label cases*, decided primarily upon the theory that the trade mark or labels placed upon the goods were so similar in character as to confuse the purchasing public into purchasing the goods of one manufacturer in the belief that he was purchasing another's, and what are known as, "palming off" cases.

It should be borne in mind that there is no claim here made that the respondent labels or stamps his goods, "Shade Shop" or otherwise.

Such cases as *Shaver vs. Heller, Elgin Watch Company vs. Illinois Watch Company*, the case of *Trappey vs. McIlhenney*, and many others relied upon by the Commission are strictly trade mark or label cases.

It is argured that the respondent did not sufficiently distinguish his place of business from that of "The Shade Shop."

A reference to photographs showing respondent's place of business (R. P. 400, 426, 374-2, 374-3) will dis-

close that if the trading public used any degree of intelligence and used their faculties of observation, confusion could not have resulted in mistaking the place of respondent for that of the establishment of Sammons.

There is no evidence in the record from which it can even be inferred that respondent had anything to do with the position his listing in the telephone directory occupied just above Sammons, it being merely a matter of policy of the telephone company in resorting to an alphabetical listing. The Commission refers (Brief p. 56) to the listing in a telephone directory (Exhibit 11, p. 369) in an attempt to show bad faith on the part of respondent and his intent to deceive the public. Listings prior to that time were carried in accordance with Exhibits 12 and 13 (pp. 369) and the telephone company's representative Hunt testified (pp. 56) that the Word Hooper and Klessner were dropped from the listing under main 4763, and the words "the, S. S. Sammons, Window Shades" were dropped from the listing under Main 4874, as a result of a business policy of the telephone company to "eliminate a lot of matter which according to the best of their observation was non-essential and space consuming," and not at the request or instance of respondent. Much importance is attached to certain excerpts from the testimony of respondent (Comm B. P. 54) in an attempt to show the intent to deceive. We respectfully contend that the whole of respondent's testimony will disclose that it is unfair to draw such a conclusion as the Commission would have you draw from the excerpts quoted.

At page 37 of Commission's brief, reference is made to certain debates and committee reports in

support of arguments as to the intention of Congress. While we do not consider the language of the Act is ambiguous, or calls for resort to such, a reference to them will clearly establish that the protection of the public is the primary purpose of the Act.

Senator Cummins is quoted as having said:

> "The unfairness must be tinctured with unfairness *to the public; not merely with unfairness to the rival or competitor;*" and that *"we are not simply trying to protect one man against another;* we are trying to protect the people of the United States." (Italics ours.)

And the Senator is further quoted as saying:

> "We are trying to protect the people of the United States, and, of course there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare (Cong. Rec. 63rd Cong. 2nd Sess. p. 11105).

From the foregoing it is clear that the Committee, having in charge the Federal Trade Commission Act, evidenced no intention on its part to interfere with the business conduct of two individuals, when that conduct does not injuriously affect the public interest.

It is contended under point IX (Com. Brief p. 43) "that the question whether a proceeding by the Commission would be to the interest to the public is an administrative one to be determined by the Commission before the institution of the proceeding and is not thereafter a subject of controversy, either before the Commission or in the court."

In the light of the language used by this court in

Federal Trade Commission vs. Eastman Kodak Company, 274 U. S. 619, 71 L. Ed. 1238; *Federal Trade Commission vs. Sinclair Refining Company*, 261 U. S. 463, 67 L. Ed. 746, this contention is most astounding, as it seems too clear to admit of any contention that the court is authorized to review every action of the Commission and to take such action thereon as it finds proper. Of course it must find by its preliminary investigation that the public interest is affected and must have reasonable belief that unfair methods of competition are being employed before the proceeding can be instituted, but after the proceeding is instituted and concluded, if it should appear to the Commission that the primary determination was wrong, then it would be its duty to dismiss the complaint, and failing to do so it is the court's duty, on the review of the whole case, to set aside any order that might be made against the respondent. Certainly the Commission can not irrevocably determine, in advance of the hearing, that unfair methods of competition are being employed, and adversely affect public interest, and despite failure of proof of these things, still adhere to the so called "administrative determination."

CONCLUSION

It is respectfully submitted, (1) that the findings of fact as made by the Commission are not predicated upon a fair interpretation or preponderance of the evidence; (2) that the record does not disclose evidence of an attempt to deceive and defraud the public, or to palm off respondent's goods for those of another; (3) that the words "Shade Shop" are not the subject of exclusive appropriation; (4) that the manner in which

respondent uses these words accompanied with his name does not constitute unfair methods of competition and will to the prudent observer not cause deception or confusion; (5) that the order to cease and desist by the Commission is not appropriate under the findings (6) that the relief sought here cannot be granted on the complaint of the Commission, the findings of fact and the order entered by the Commission, and (7) that the judgment and decree of the court below should be affirmed.

If the contention of the Federal Trade Commission in this case is to be sustained then the very purpose for which the Commission was instituted will fail and its function will be to stifle competition rather than to encourage it; the decisions of the Supreme Court wherein competition is encouraged and upheld will be for naught and within a comparatively short time we will see and have but one shop dealing in any one commodity throughout our broad and great country. For to sustain the contention of the Commission in this case will enable one to adopt a strictly descriptive word coupled with the word shop and entitle the first user thereof to the appropriation to the exclusion of all others. Such contention we cannot believe this Court will sustain. Where could we hope to draw the line—what would be the limitation?

Respectfully submitted,

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